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**Mitchell Lazarus**

Tel: 202/857-6466  
Fax: 202/857-6395  
lazarusm@arentfox.com  
http://www.arentfox.com

August 14, 1997

Mr. John Cimko, Jr., Chief  
Ms. Nancy Boocker, Deputy Chief  
Policy Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street NW, Room 7002  
Washington DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Re: Rules and Policies for Local Multipoint Distribution Service  
and for Fixed Satellite Services, CC Docket No. 92-297 (Ex  
Parte Communication)**

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Dear John and Nancy:

This is an ex parte written communication filed on behalf of Sierra Digital Communications, Inc. ("Sierra") pursuant to Section 1.1206(a)(1) of the Commission's Rules.

This letter expands on issues we discussed during the visit Hal Tenney, President of Sierra, and I made to your office on July 31. The issues are among those raised in the Petition for Partial Reconsideration Sierra filed in this proceeding, in which Sierra asked the Commission not to allocate all 300 MHz of the 31 GHz band to LMDS, but instead to retain the outer 150 MHz (31.000-31.075 and 31.225-31.300 GHz) for private use under the current rules.

**Projected Growth at 31 GHz and in LMDS**

The Commission made a fundamental error when it overlooked the growth in point-to-point service in the 31 GHz band.

The Commission based its original proposal to reallocate the 31 GHz band in part on its belief that there were only 27 licensees in the band.<sup>1/</sup> Sierra and others contested that claim, after which the Second Report and Order raised the estimate

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<sup>1/</sup> Fourth Notice at 75 (IFRA § IV).

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several-fold, to 86 licensees operating 122 stations.<sup>2/</sup> But even then, despite evidence Sierra and others had placed in the record, the Commission continued to ignore the strong rate of growth in the band.

Sierra, which accounts for the majority of the 31 GHz transmitters in operation, shipped 75% more equipment in 1996 than it did in 1995. Prior to release of the Fourth Notice (which first proposed reallocating the 31 GHz band), Sierra projected to ship four times more equipment in 1997 than in 1996 — a conservative estimate based on Sierra's past business with governmental entities and master contract relationships with its common carrier customers. Soon after release of the Fourth Notice, one 31 GHz supplier listed 42 customer sites — some quite large — then being installed, on order, or in the planning and specification stages. The Commission itself conceded that several applications were filed after the release date of the Fourth Notice by applicants not currently licensed — further evidence of pressure for growth in the band, even under the chilling effect of the Fourth Notice.<sup>3/</sup>

Growth projections are important in this proceeding because they are the sole basis for allocating spectrum to LMDS. Today LMDS has only one small system in operation.<sup>4/</sup> The Commission's plans to auction well over 1 GHz for LMDS nationwide are not to serve that one system, but rather reflect projections by LMDS interests as to the likely growth of the service over the next several years. These projections are necessarily speculative in the case of LMDS because there has not been enough experience in the real world to support convincing projections of long term, nationwide demand.

In short, the Second Report and Order declined to reserve part of the 31 GHz band for private licensing in part on a finding that "the number of entities operating under the existing rules for 31 GHz services is small and the locations are very few and confined."<sup>5/</sup> The Commission did not take any account of growth in 31 GHz services. In marked contrast, when allocating spectrum for LMDS, the

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<sup>2/</sup> Second Report and Order at ¶ 46.

<sup>3/</sup> Documentation appears in Sierra's Petition for Partial Reconsideration at 6-9 (filed May 5, 1997).

<sup>4/</sup> Second Report and Order at ¶ 9 n.10.

<sup>5/</sup> Second Report and Order at ¶ 56.

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Commission considered *only* projected growth, without considering the minuscule level of present usage. This disparity of treatment is arbitrary and capricious.

Sierra does not suggest the Commission should stop considering projected demand. That that would virtually preclude the introduction of new services. Instead, Sierra urges the Commission to take into account reasonable growth projections for both services. That can be accomplished by allocating to LMDS all 1,000 MHz at 28 GHz (150 MHz of which is suitable only for hub-to-subscriber use) plus the middle 150 MHz of the 31 GHz band, while retaining the other 150 MHz for point-to-point use. As explained in Sierra's Petition for Partial Reconsideration, this compromise gives LMDS all of the unencumbered spectrum it has ever justified, while permitting point-to-point public safety operations to continue at 31 GHz.

## Unlicensed Operation at 31 GHz

Sierra became aware during this proceeding that some 31 GHz users were unlicensed, in violation of Commission rules. Sierra understands that at least one municipality filed comments as a self-described user, although it does not appear in the Commission's licensing database. The Second Report and Order notes that discrepancies between lists of users in other parties' comments and the Commission's database might reflect other unlicensed users. The Commission concludes, "If users of 31 GHz spectrum have failed to apply for a license and are not operating lawfully, they cannot expect to be included in our considerations here."<sup>6/</sup>

Sierra agrees that unlicensed users are not entitled to consideration here. But Sierra is concerned that the presence of unlicensed users might incline the Commission to reach a decision that would unfairly penalize the many law-abiding licensed users — who are entitled to full consideration, and who have no control over their unlicensed co-users.<sup>7/</sup> The proper remedy for unlicensed operation is the enforcement procedures set out in Title V of the Communications Act. The presence of unlicensed users should have no bearing on the Commission's deliberations in this proceeding.

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<sup>6/</sup> Second Report and Order at ¶ 48.

<sup>7/</sup> Sierra likewise has no control over unlicensed use of its products. Most of Sierra's sales are made to value-added resellers. Sierra ordinarily does not know who ultimately purchases its products for end use.

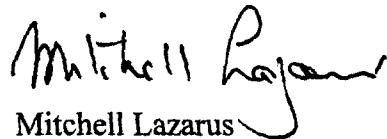
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Please do not hesitate to call if you have any questions about the foregoing.

Respectfully submitted,

  
Mitchell Lazarus

cc (by Hand Delivery):

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Chairman Reed E. Hundt  
Commissioner James H. Quello  
Commissioner Rachelle B. Chong  
Commissioner Susan Ness  
Jackie Chorney  
Rudolfo M. Baca  
Suzanne Toller  
David R. Siddall  
David Wye

Hal Tenney  
Sierra Digital Communications, Inc.